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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WESLEY LEONEL SOLIS,

Defendant and Appellant.

G048019

(Super. Ct. No. 10ZF0091)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

This is our second opinion in this case. In the first, we held appellant’s statutorily mandated prison sentence of 50 years to life for committing special circumstances murder with a firearm violated the Eighth Amendment because it did not offer appellant, a juvenile offender, a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham v. Florida* (2010) 560 U.S. 48, 75 (*Graham*)). We also recognized Penal Code section 3051 affords juvenile offenders such as appellant a parole hearing during the 25th year of their incarceration. (Pen. Code, § 3051, subd. (b)(3).)¹ We determined section 3051 rendered appellant’s sentence constitutional, but to ensure he received the benefit of the statute, we modified his sentence to reflect his entitlement to a parole hearing after serving 25 years in prison. (*People v. Solis* (2014) 224 Cal.App.4th 727, rev. granted June 11, 2014.)

After granting review, the California Supreme Court transferred the case back to us with directions to vacate our decision and reconsider the matter in light of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). In *Franklin*, the Supreme Court came to the same conclusion as we did about the effect of section 3051; it interpreted the statute as a legislative cure to any lengthy mandatory sentence imposed on a juvenile offender that arguably violates the Eighth Amendment. However, the court also ruled that because the statute applies by operation of law Eighth Amendment claims geared toward such sentences are foreclosed under the mootness doctrine. (*Franklin, supra*, 63 Cal.4th at pp. 276-280.) Accordingly, we need not decide whether appellant’s sentence is unconstitutional on its face.

Although appellant’s constitutional claim is moot, we must still decide whether he “was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*Franklin, supra*, 63 Cal.4th at p. 284.)

¹ All further statutory references are to the Penal Code.

For the reasons explained below, we believe he was. We therefore vacate our prior opinion and affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2008, appellant was a 17-year-old member of the Citron Street gang. That night, he and his fellow gang members confronted Mario Barajas and other members of a rival gang. During the confrontation, someone in Barajas' group fired a gun. In response, appellant chased Barajas and cornered him between two apartment buildings. Appellant then fired two shots at Barajas. The first shot struck Barajas in the chest, killing him, and the second shot missed Barajas and lodged in a dresser mirror in a nearby apartment unit. Following his arrest, appellant told police the shot that was fired from Barajas' group tore through his clothing. And after he cornered Barajas in the alley, Barajas came toward him, so he shot him in self-defense.

At trial, the defense presented evidence appellant's cognitive functioning is in the borderline retarded range. Defense counsel argued this impaired appellant's ability to make rational decisions, and given the circumstances of the shooting, he was, at most, guilty of voluntary manslaughter. The jury, however, convicted appellant of first degree murder, shooting at an inhabited dwelling and street terrorism. (§§ 187, 246, 186.22, subd. (a).) As to the murder count, the jury found true the special circumstance allegation appellant acted to further the activities of his gang (§ 190.2, subd. (a)(22)), as well as the allegation he caused Barajas' death by personally discharging a firearm (§ 12022.53, subd. (d)). The jury also found appellant acted for the benefit of a criminal street gang in committing the murder and the shooting offense. (§ 186.22, subd. (b).)

Given the jury's true finding on the special circumstances allegation, the trial court had the discretion to sentence appellant to either life in prison without parole (LWOP) or 25 years to life on the murder count. (§ 190.5, subd. (b).) But the court had no discretion on the firearm enhancement; rather, it was required to impose a mandatory sentence of 25 years to life, based on the jury's finding appellant committed the murder

with a firearm. (§ 12022.53, subds. (d), (g), (h).) Thus, under California's sentencing scheme, appellant faced a mandatory minimum term of 50 years to life in prison.

Appellant's sentencing hearing did not take place until February 8, 2013. That date is important because it was preceded by a trio of cases that changed the parameters of juvenile sentencing. In *Graham, supra*, the United States Supreme Court held it is cruel and unusual to sentence juvenile nonhomicide offenders to LWOP. (*Graham, supra*, 560 U.S. at p. 74.) In *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*), the high court extended the reasoning of *Graham* to prohibit mandatory LWOP for juvenile homicide offenders. And in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme court interpreted *Graham* and *Miller* to bar de facto LWOP sentences for juvenile nonhomicide offenders.

The underlying rationale of these decisions is that "[b]ecause juveniles have diminished culpability and greater prospects for reform," as compared to adult offenders, "'they are less deserving of the most severe punishments.' [Citation.]" (*Miller, supra*, 132 S.Ct. at p. 2464.) Indeed, the United States Supreme Court has made it clear that the "appropriate occasions for sentencing juveniles to [LWOP] will be uncommon" and that such punishment should be reserved for "'the rare juvenile offender whose crime reflects irreparable corruption.'" (*Id.* at p. 2469.) Accordingly, "sentencers in homicide cases [must] 'take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' [Citation.]" (*Caballero, supra*, 55 Cal.4th at p. 268, fn. 4.) Absent exceptional circumstances, juvenile offenders must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, 560 U.S. at p. 75.)

Going into appellant's sentencing hearing, the parties and the court were well aware of *Graham*, *Miller* and *Caballero*. In fact, the entire sentencing process was geared around those decisions. While recognizing *mandatory* LWOP for juvenile

murderers is unconstitutional under *Miller*, the prosecutor argued appellant deserved LWOP because he was a hardened gang member who committed an egregious killing. The defense disagreed. It contended LWOP was not a suitable punishment for appellant given his age, his limited cognitive abilities and his claim of self-defense. Defense counsel further claimed that the mandatory minimum sentence of 50 years to life was unconstitutional because it amounted to a de facto life sentence that would deprive appellant of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Instead of LWOP or 50 years to life, defense counsel argued in favor of a lesser term, as explained below.

In support of his claim for leniency, defense counsel argued appellant was particularly impressionable and vulnerable due to his age. The argument was rooted in the realization that older gang members often put pressure on younger members of their gang to commit crimes on the gang's behalf. Since appellant was in the company of older gang members when the confrontation in this case arose, defense counsel surmised appellant's youth made him susceptible to this type of pressure.

Defense counsel also provided the court with a psychological report that sets forth appellant's developmental background and the results of cognitive testing he underwent while he was in custody in this case. The testing revealed appellant has "significant intellectual deficits" in terms of his verbal skills, comprehension and memory. The report does not state the cause of those deficits, but it does note that appellant sustained several head injuries when he was a child. The report also points out appellant started "huffing" spray paint cans to get high when he was 11 years old and soon progressed to using alcohol, marijuana and methamphetamine on a regular basis.

In addition to appellant's psychological report, a lengthy probation report was prepared for the trial court's consideration. Among other things, the probation report describes appellant's current crimes, his prior criminal record (appellant has been involved in criminal activity since the age of 14) and his adjustment while in custody

(appellant has committed numerous “minor” and “major” rule violations). The probation report also recognizes appellant has a long history of drug and alcohol abuse and “is suffering from borderline intellectual functioning, equivalent to the second-to-third-grade level.”

At the outset of the sentencing hearing, the trial court stated it had reviewed these materials, as well as the parties’ sentencing briefs. Recognizing appellant was only 17 years old at the time of the murder, the court said this was a “unique case” that required it to apply “evolving law” in arriving at appellant’s sentence. In that regard, the court was referring to *Graham*, *Miller* and *Caballero*, in addition to section 1170, subdivision (d)(2), which was enacted in the wake of those decisions. That provision allows juvenile offenders who have been sentenced to LWOP to petition for recall and resentencing after they have served 15 years in prison. In light of this statute defense counsel argued it only made sense that appellant should be given the opportunity for release after 15 years, and therefore the court should sentence him to 15 years to life in prison. Alternatively, defense counsel argued a maximum sentence of 25 years to life would be appropriate because it would give appellant a meaningful opportunity to show his fitness to reenter society after an extended period of incarceration.

In the end, the court opted against a straight LWOP term and sentenced appellant to 50 years to life in prison. Although appellant committed a grave offense, the court felt his age and limited cognitive functioning militated against the imposition of an LWOP term. The court’s ruling was grounded in the belief juvenile offenders such as appellant have “diminished capacity and heightened capacity for change.” While recognizing appellant would not be eligible for parole until the age of 67, the court felt a 50-year-to-life sentence afforded him a meaningful opportunity to show the maturity and rehabilitation needed to obtain his release from prison someday.

DISCUSSION

After appellant was sentenced, the Legislature enacted section 3051 “to bring juvenile sentencing into conformity with *Graham, Miller, and Caballero*.” (*Franklin, supra*, 63 Cal.4th at p. 277.) As to offenders such as appellant, who have committed crimes carrying a term of 25 years to life or greater and are not otherwise excluded from its terms, the statute entitles them to a “youth offender parole hearing” 25 years into their prison sentence. (§ 3051, subd. (b)(3).) For all intents and purposes, that means appellant “is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent.” (*Franklin, supra*, 63 Cal.4th at pp. 279-280.) Therefore, as *Franklin* makes clear, and appellant admits, his claim that his 50-year-to-life sentence constitutes an unconstitutional de facto life term is legally moot. (*Id.* at p. 280.)

The only question that remains is whether appellant is entitled to a supplemental sentencing hearing to allow him the opportunity to present information bearing on his future parole hearing. Appellant asks us to remand the matter to the trial court so it can make this determination, but because the record shows appellant has already fully litigated the issues arising from his status as a juvenile offender there is no need for a remand.

The situation in *Franklin* was much different. Because the sentencing hearing in that case was conducted *before* the opinions in *Graham, Miller* and *Caballero* were handed down, the trial court determined any information related to the juvenile’s youthfulness and future parole eligibility was irrelevant. Consequently, the record was largely devoid of information pertaining to those issues. (*Franklin, supra*, 63 Cal.4th at pp. 282-283.) The Supreme Court found this troubling because, in conducting a youth offender parole hearing under section 3051, the parole board must “‘give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased immaturity.’” (§ 4801, subd. (c).)”

(*Franklin, supra*, 63 Cal.4th at p. 283.) Section 3051 “also contemplates that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate” the parole board’s review. (*Franklin, supra*, 63 Cal.4th at p. 283.) Given this statutory framework, *Franklin* determined such information – whether in the form of “documents, evaluations, or testimony” – should be provided at the juvenile’s original sentencing hearing. (*Id.* at p. 284.) Due to the fact the record in *Franklin* was unclear as to whether the juvenile in that case had ever been afforded the opportunity to present that kind of information at his sentencing hearing, the Supreme Court remanded the matter for the trial court to make that determination. (*Ibid.*)

The crucial difference between *Franklin* and our case is that appellant’s sentencing hearing was conducted after *Graham*, *Miller* and *Caballero* were decided. Consequently, the hearing was fully informed by the precepts established in those cases. Granted, section 3051 was not yet in effect at the time of the hearing, but appellant presented considerable argument and evidence showing why, as a youthful offender, he deserved to be treated differently than an adult offender. Defense counsel not only addressed appellant’s impressionability and relative immaturity, he presented a detailed psychological report that discusses appellant’s developmental background and includes the results of numerous psychological tests that were administered to appellant on the eve of his sentencing hearing. It is not often that a trial court has access to such a detailed profile of the defendant before selecting the appropriate punishment.

Prior to sentencing, the trial court also considered a 22-page probation report that includes a thorough discussion of appellant’s social history, current offenses, prior record and adjustment in custody. Thus, unlike the situation in *Franklin*, the trial

court here had a plethora of information from which it could meaningfully apply the principles set forth in *Graham*, *Miller* and *Caballero*.²

Appellant contends that because the bulk of his sentencing hearing was devoted to the question of whether he should receive a straight LWOP sentence or an indeterminate life term, not much was said or done in terms of laying the groundwork for his future parole hearing. But in discussing appellant's appropriate sentence the parties and the trial court considered several factors pertaining to appellant's youth, including his immaturity, processing issues and inability to appreciate the risks and consequences of his behavior. Citing *Graham* and *Miller*, the trial court even recognized that juvenile offenders such as appellant deserve special treatment and consideration "due to their diminished capacity and heightened capacity for change."

On this record, there is no need to remand the matter to have the trial court decide whether appellant had the opportunity to litigate the issues bearing on his future parole hearing, ala *Franklin*. It appears to us appellant not only had the opportunity to do so, *he took full advantage of that opportunity*. Consequently, the parole board will have a meaningful baseline of appellant's characteristics and circumstances to judge his maturity and rehabilitation when his parole hearing is held. This obviates the need for further proceedings on that issue. (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 68-70 [*Franklin* remand not required where sentencing hearing occurred after *Graham*, *Miller* and *Caballero* and included consideration of the juvenile offender's age and impaired cognitive functioning].)

² The record also reflects the probation officer sent appellant several letters of reference to provide to his friends and family members who might be inclined to speak on his behalf. This shows the probation officer reached out for information respecting appellant's characteristics and circumstances at the time of his offenses. However, the probation officer did not receive any response to the letters, and even now it is unclear what evidence appellant would present if he were granted a supplemental sentencing hearing.

DISPOSITION

Our prior opinion in this matter is vacated, and the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.